

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today
(1) was not written for publication in a law journal and
(2) is not binding precedent of the Board.

Paper No. 32

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MARTIN ANDREA
and
CHRISTIAN ANDREA

Appeal No. 97-2734
Application 08/394,067¹

ON BRIEF

¹ Application for patent filed February 24, 1995. According to appellants, the application is a continuation of Application 08/174,236, filed December 28, 1993, abandoned.

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Before COHEN, FRANKFORT and McQUADE, Administrative Patent Judges.

FRANKFORT, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claim 12, and from the examiner's refusal to allow claims 1 through 4, 8, 9, 10 and 11 as amended subsequent to the final rejection in a paper filed August 5, 1996 (Paper No. 22). Claims 5 through 7, the only other claims pending in the application, stand allowed.

Appellants' invention relates to an orthopedic crutch which includes a handgrip that is movably mounted in a vertical direction and includes spring biasing to provide dynamic support to the user and improve the comfort level to the user during use of the crutch. Figures 1, 2 and 5 through 10 of the application show the details of appellants' movable handgrip and supporting structure. Claims 1 and 12 are representative of the subject matter on appeal and a copy of those

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claims, as they appear in the Appendix to appellants' brief,
is attached to this decision.

The prior art references of record relied upon by
the examiner in rejecting the appealed claims are:

Stein	4,476,885	Oct. 16, 1984
Hansen et al. (Hansen)	4,753,259	June 28, 1988
Acosta, Sr. (Acosta)	4,763,680	Aug. 16, 1988
Greatwood	5,101,846	Apr. 7, 1992

Claims 1 through 4 and 8 through 11 stand rejected
under 35 U.S.C. § 112, first paragraph, as being based on a
specification which, as originally filed, does not provide
support for the invention as now claimed. According to the
examiner,

[t]he original specification does not
disclose "a dynamic support" . . . as is
now claimed in claim 1 [and also in inde-
pendent claims 10 and 11] or "means for
dynamically supporting . . ." as in
claim 4 (final rejection, page 2).

Claims 1 through 4 and 8 through 11 stand addition-
ally rejected under 35 U.S.C. § 112, second paragraph, as
being indefinite for failing to particularly point out and

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distinctly claim that which appellants regard as their invention. In the examiner's view (answer, page 4), the terms "dynamically" and "dynamic" are unclear "because the term 'dynamic' was found to be vague and confusing as to its meaning." The examiner goes on to urge that "[i]t is unclear whether the recited term refers to 'movement' or 'energy/forces'."

In addition to the foregoing rejections, the appealed claims stand rejected under 35 U.S.C. § 103 as follows:

a) claims 1 through 4, 8, 9 and 12 as being unpatentable over Stein in view of Acosta;

b) claim 10 as being unpatentable over Stein in view of Acosta as applied to claim 1 above, and further in view of Hansen; and

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c) claim 11 as being unpatentable over Stein in view of Acosta as applied to claim 1 above, and further in view of Greatwood.

Rather than reiterate the examiner's full statement of the above-noted rejections and the conflicting viewpoints advanced by the examiner and appellants regarding those rejections, we make reference to the final rejection (Paper No. 20, mailed March 5, 1996) and to the examiner's answer (Paper No. 29, mailed February 19, 1997) for the examiner's complete reasoning in support of the rejections, and to appellants' brief (Paper No. 28, filed December 6, 1996) for appellants' arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to appellants' specification and

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claims, to the applied prior art references, and to the respective positions articulated by appellants and the examiner. As a consequence of our review, we have made the determinations which follow.

We turn first to the examiner's rejection of appealed claims 1 through 4 and 8 through 11 under 35 U.S.C. § 112, first paragraph, which rejection we understand to be based upon the written description requirement of the first paragraph of § 112. In general, the test for determining compliance with the written description requirement of § 112 is whether the disclosure of the application as originally filed reasonably conveys to the artisan that the inventor had possession at that time of the later claimed subject matter, rather than the presence or absence of literal support in the specification for the claim language under consideration. Further, it is also well settled that the content of the drawings may be considered in determining compliance with the written description requirement. See Wang Lab. Inc. v. Toshiba Corp., 993 F.2d 858, 865, 26 USPQ2d 1767, 1774 (Fed.

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Cir. 1993); Vas-Cath Inc. v. Mahurkar, 935 F.2d 1555, 1563-64, 19 USPQ2d 1111, 1117 (Fed. Cir. 1991); see also In re Kaslow, 707 F.2d 1366, 1375, 217 USPQ 1089, 1096 (Fed. Cir. 1983).

In this particular instance, after considering appellants' disclosure as a whole and recognizing that the claimed subject matter does not need to be described in haec verba in the specification in order for the specification to satisfy the written description requirement, it is our opinion that the originally filed specification provides clear support for the invention as now claimed. We are in substantial agreement with appellants' argument, found on page 7 of the brief, that the recitation in claims 1, 10 and 11 relating to the "dynamic support" limitation and the "means for dynamically supporting" of claim 4, each find support in the originally filed specification and drawings of the application. As can be readily perceived from appellants' specification at pages 1, 2, 5 and 7, among others, the handgrip of the crutch therein is expressly disclosed as being movably mounted in a vertical direction and to include spring

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biasing to provide "dynamic support" to the user. At page 5 of the specification, it is explained that

[i]n operation, as weight is shifted to the crutches 15, the handgrip 24 moves downwardly against a biasing force to provide dynamic support to the user at the handgrip 24. As the user shifts his weight away from the crutches 15, the handgrip 24 is biased upwardly.

Accordingly, we find clear antecedent basis and support for the language of claims 1, 4, 10 and 11 on appeal in appellants' specification as originally filed and will therefore not sustain the examiner's rejection of these claims, or the claims which depend therefrom, under 35 U.S.C. § 112, first paragraph.

Turning next to the examiner's rejection of claims 1 through 4 and 8 through 11 under 35 U.S.C. § 112, second paragraph, after reviewing appellants' specification and claims as noted above, and appellants' arguments on pages 7

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through 9 of their brief, it is our opinion that the scope and content of the subject matter embraced by appellants' claims on appeal is reasonably clear and definite, and fulfills the requirement of 35 U.S.C. § 112, second paragraph, that they provide those who would endeavor, in future enterprise, to approach the area circumscribed by the claims, with the adequate notice demanded by

due process of law, so that they may more readily and accurately determine the boundaries of protection involved and evaluate the possibility of infringement and dominance. See In re Hammack, 427 F.2d 1378, 1382, 166 USPQ 204, 208 (CCPA 1970). Given the clear description on pages 5 and 7 of appellants' specification concerning the operation of the movable handgrip therein and the nature of the dynamic support it provides, we are unable to agree with the examiner that the term "dynamic" is in any way "vague and confusing as to its meaning" (answer, page 4). Therefore, we will not sustain the examiner's

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rejection of appellants' claims 1 through 4 and 8 through 11 under 35 U.S.C. § 112, second paragraph.

We next look to the examiner's prior art rejections of the appealed claims, turning first to the rejection of claims 1 through 4, 8, 9 and 12 under 35 U.S.C. § 103 as being unpatentable over Stein in view of Acosta. Independent claim 1 on appeal defines an orthopedic crutch which comprises a pair of vertical supports (e.g., 26); an upper cross-member (e.g., 17) rigidly connected to said vertical supports at an upper end forming an armpit support; a vertical support leg (e.g., 16), rigidly

connected relative to the lower ends of the vertical supports; a handgrip (e.g., 24), and

means for movably supporting said handgrip relative to said vertical support leg and said armpit support to enable said handgrip to move in a vertical direction generally parallel to said vertical supports while said orthopedic crutch is in use; and

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means for biasing said supporting means to provide a dynamic support for said handgrip while said orthopedic crutches [sic] is in use.

In somewhat different terms, independent claim 12 on appeal defines an orthopedic crutch which comprises a pair of vertical supports (e.g., 26); an upper cross-member (e.g., 17) rigidly connected to said vertical supports at an upper end forming an armpit support; a support leg (e.g., 16), rigidly connected intermediate the opposing ends of the vertical supports; a handgrip (e.g., 24); and

means for dynamically supporting said handgrip while said orthopedic crutch is in use to provide a movable support for both upward and downward movement of said handgrip.

In the examiner's view the crutch of Stein includes a handgrip as defined in appellants' claims 1 and 12, with the structure seen best in Figure 3 and 4 of Stein being responsive to the "means" clauses of claims 1 and 12. However, we share appellants' view that Stein's crutch

includes a handgrip which is static while the crutch is in use by a patient, i.e., a handgrip which is not movable in a vertical direction while the crutch is in use and which does not include "means for biasing said supporting means to provide a dynamic support for said handgrip while said orthopedic crutches [sic, crutch] is in use" (emphasis added) as required in claim 1, and claims 10 and 11, on appeal. Nor does the crutch of Stein include "means for dynamically supporting said handgrip while said orthopedic crutch is in use to provide a movable support for both upward and downward movement of said handgrip" (emphasis added) as set forth in independent claim 12 on appeal. Although the position of the handgrip of Stein is adjustable upwardly or downwardly when the pins (12a) are released from the tubular members (14, 16), the handgrip is then locked in its adjusted position by re-registration of the pins (12a) with the apertures (50) of the tubular members (14, 16) to ready the crutch for use. See, e.g., column 4, lines 18-26, of Stein. Thus, even if it would have been obvious to one of ordinary skill in the art to provide the crutch of

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Stein with an adjustable support leg (36) like that of Acosta, the resulting crutch would still not be the same as that set forth in appellants' claims 1 through 4, 8, 9 and 12 on appeal. Accordingly, the examiner's rejection of claims 1 through 4, 8, 9 and 12 under 35 U.S.C. § 103 as being unpatentable over Stein in view of Acosta will not be sustained.

We have also reviewed the patents to Hansen and Greatwood applied by the examiner in the § 103 rejections of claims 10 and 11, respectively. However, we find nothing in either of these references which would supply that which we have noted above to be lacking in the crutch of the Stein patent. Accordingly, the examiner's rejections of claims 10 and 11 on appeal under 35 U.S.C. § 103 will likewise not be sustained.

To summarize our decision, we note that the examiner's rejections of claims 1 through 4 and 8 through 11

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under 35 U.S.C. § 112, first paragraph, and under 35 U.S.C. §
112, second paragraph, have not been sustained; and that the
examiner's rejections of the appealed claims under 35 U.S.C.
103 relying on Stein

as the basic reference (rejections a through c above) have
also not been sustained.

The decision of the examiner is, accordingly,
reversed.

REVERSED

	IRWIN CHARLES COHEN)	
	Administrative Patent Judge)	
)	
)	
)	BOARD OF
PATENT)	
	CHARLES E. FRANKFORT)	APPEALS AND

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	Administrative Patent Judge)
INTERFERENCES)
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)
	JOHN P. McQUADE)
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APPENDIX

1. An orthopedic crutch comprising:

a pair of vertical supports;

an upper cross-member, rigidly connected to said vertical supports at an upper end forming an armpit support;

a vertical support leg, rigidly connected relative to a lower end of said pair of said vertical supports, opposite said upper end;

a handgrip;

means for movably supporting said handgrip relative to said vertical support leg and said armpit support to enable said handgrip to move in a vertical direction generally parallel to said vertical supports while said orthopedic crutch is in use; and

means for biasing said supporting means to provide a dynamic support for said handgrip while said orthopedic crutches is in use.

12. An orthopedic crutch comprising:

a pair of vertical supports;

an upper cross-member, rigidly connected to said vertical supports at an upper end forming an armpit support;

a support leg, rigidly connected, intermediate the opposing end of said support;

a handgrip; and

means for dynamically supporting said handgrip while said orthopedic crutch is in use to provide a movable support for both upward and downward movement of said handgrip.